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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
EILEEN MCGREW, PHH
MORTGAGE CORPORATION,
STATE OF CALIFORNIA
FRANCHISE TAX BOARD.
Defendants.

Case No. CV14-02647-R(ASx)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
SUBMITTED BY PLAINTIFF
UNITED STATES OF AMERICA
PURSUANT TO ORDER GRANTING
THE UNITED STATES OF
AMERICA'S MOTION FOR
SUMMARY JUDGMENT

Hearing Date: 12/15/2014

Time: 10:00 a.m.

Location: Courtroom: 8
United States Courthouse
312 N. Spring Street
Los Angeles, CA 90012

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FINDINGS OF FACT

1. On or about May 10, 1996, defendant Eileen McGrew and her former husband, Mark K. McGrew (“Kenneth McGrew”) acquired the real property that is the subject of this action (the “Subject Property”) pursuant to a grant deed that had been issued to them by the former owner.

2. The Subject Property is a single family residence that is located in Moorpark, California 93021 and is legally described as:

Lot 66, Tract No. 3963-1, in the City of Moorpark, County of Ventura, State of California, as per map recorded in Book 107, page 90 through 103 inclusive of maps, in the office of the County Recorder of said county.

Except all of the coal, lignite, coal oil, petroleum, naptha, asphalt, maltha, brea, natural gas, and all kindred or similar substances and other rights as reserved by Simi Land and Water company in deed recorded November 16, 1889, in Book 29, page 514, of deeds.

By instruments recorded October 13, 1972, in book 4475, page 900 and October 7, 1986, as instrument 86-138922, official records, all rights to enter upon the surface of said land and to use any of the subsurface of said land above a depth of 100 feet below the surface thereof were relinquished.

3. Between on or about June 26, 1996 and March 1, 2010, when Kenneth McGrew transferred his interest in the Subject Property to Eileen McGrew, Kenneth McGrew and Eileen McGrew owned the Subject Property as community property.

4. On or about December 20, 2004, the Internal Revenue Service (“IRS”) made assessments against Kenneth McGrew for outstanding federal income tax liabilities for the 2000 and 2001 tax years, based on substitutes for returns that the IRS had prepared on Kenneth McGrew’s behalf.

1 5. On or about May 29, 2006, the IRS made an assessment against Kenneth
2 McGrew for outstanding federal income tax liabilities for the 2002 tax year based
3 on a substitute for return that the IRS had prepared on Kenneth McGrew's behalf.

4 6. On or about August 8, 2007, Kenneth McGrew filed federal income tax
5 returns for the 2000 through 2005 tax years.

6 7. After receiving the returns, the IRS abated portions of the assessments
7 that it had made previously, based on the substitutes for returns for 2000, 2001, and
8 2002, and made assessments against Kenneth McGrew with respect to 2003
9 through 2005 (collectively, the "Assessments"), as follows:

Form	Tax Period	Assessed Tax/Penalty	Assessment Date
1040	2000	\$25,019.00	12/20/2004
1040	2001	\$61,267.15	12/20/2004
1040	2002	\$16,677.00	5/29/2006
1040	2003	\$31,500.19	9/24/2007
1040	2004	\$5,623.27	9/17/2007
1040	2005	\$27,215.32	9/24/2007

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18 8. On the following dates, the IRS filed the following Notices of Federal
19 Tax Liens with the Ventura County Clerk and Recorder with respect to the
20 Assessments and subsequent accruals (the "NFTLs"):

Form	Tax Period	Recorded	Lien Number	Amount
1040	2000	10/04/2006	00210744	\$59,017.66
1040	2001	10/04/2006	00210744	\$163,181.07
1040	2002	10/04/2006	00210744	\$25,490.02
1040	2003	10/22/2007	00198255-0	\$44,643.99
1040	2004	10/22/2007	00198255-0	\$7,384.05
1040	2005	10/22/2007	00198255-0	\$32,443.71

1 15. In September 2008, Eileen McGrew's attorney filed a Mandatory
2 Settlement Conference Statement on Eileen McGrew's behalf in the Dissolution
3 Proceedings which stated that there was a tax lien "against the former family
4 residence in the hundreds of thousands of dollars."

5 16. On or about September 28, 2009, the Court in the Dissolution
6 Proceeding issued a Ruling on Submitted Matter (the "Property Distribution
7 Order"), which, among other things, (1) found that the date of separation was
8 February 15, 2002, and (2) allocated community assets and liabilities between
9 Kenneth McGrew and Eileen McGrew. In allocating the community assets and
10 liabilities, the Court ordered Kenneth McGrew to transfer title to the Subject
11 Property to Eileen McGrew, noted that the Subject Property was "encumbered by
12 an IRS tax lien," and ordered that the "tax obligation to the IRS" was Kenneth
13 McGrew's responsibility.

14 17. Pursuant to the Property Distribution Order, on or about March 1, 2010,
15 the Executive Officer and Clerk of the Court in the Dissolution Proceedings
16 executed an Interspousal Transfer Deed on Kenneth McGrew's behalf, transferring
17 Kenneth McGrew's interest in the Subject Property to Eileen McGrew as her sole
18 and separate property.

19 18. On or about June 26, 1996, Eileen McGrew and Kenneth McGrew
20 obtained a loan from PHH Mortgage Corporation (the "PHH Loan") in connection
21 with their purchase of the Subject Property.

22 19. The Subject Property is secured by a deed of trust in favor of defendant
23 PHH Mortgage Corporation that was recorded on or about July 2, 1996 to secure
24 the payment of the Loan.

25 20. On or about March 1, 2004, December 29, 2005, September 29, 2008,
26 August 31, 2009 and November 23, 2009, the State of California Franchise Tax
27 Board (the "FTB") recorded liens against Kevin McGrew to secure the payment of
28 delinquent California State income taxes for the tax years ending December 31,

1 2001, December 31, 2003, December 31, 2002 and December 31, 2004, December
2 31, 2005 and December 31, 2006, respectively. As of October 15, 2014, the
3 delinquent California State tax liabilities totaled \$52,798.72.

4 21. On October 29, 2014 the United States filed a Stipulation Between
5 Plaintiff United States of America And Defendant State of California Franchise
6 Tax Board (Docket No. 21)(the “FTB” Stipulation”), regarding their respective
7 lien priorities.

8 22. The PHH deed of trust is superior to the California State and federal tax
9 liens.

10 23. As of October 31, 2014, the PHH Loan pay-off amount was
11 \$117,188.54.

12 24. Any uncontroverted fact deemed more appropriately designated as a
13 conclusion of law or as a mixed conclusion of fact and law is incorporated herein
14 as a conclusion of law.

15 **CONCLUSIONS OF LAW**

16 1. Summary judgment is appropriate “if the pleadings, depositions,
17 answers to interrogatories, and admissions on file, together with the affidavits, if
18 any, show that there is no genuine issue of any material fact and that the moving
19 party is entitled to judgment as a matter of law.” Fed. R. Civ. Proc. 56(c).

20 2. A party seeking summary judgment bears the initial burden of
21 informing the court of the basis for its motion and of identifying those portions of
22 the pleadings and discovery responses that demonstrate the absence of a genuine
23 issue of material fact. See, Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); but
24 see also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)(“[T]he
25 substantive law will identify which facts are material. Only disputes over facts that
26 might affect the outcome of the suit under the governing law will properly preclude
27 the entry of summary judgment....”).
28

1 3. The moving party need not disprove the opposing party's case.
 2 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rather, if the moving party
 3 satisfies its initial burden, the party opposing the motion must set forth specific
 4 facts, through affidavits or admissible discovery materials, showing that there
 5 exists a genuine issue for trial. Id. at 323-34; Fed. R. Civ. P., 56(c)(1). "This
 6 burden is not a light one." In re Oracle Corp. Sec. Litig., 627 F.3d 376,387 (9th
 7 Cir. 2010).

8 4. Regardless of when federal taxes are actually assessed, the taxes are
 9 considered due and owing, and constitute a liability, as of the date the tax return for
 10 the particular period is required to be filed. Internal Revenue Code (26 U.S.C.) §
 11 6151(a); Medina v. Offord Finance, Inc., 205 B.R. 216, 221 n. 13 (B.A.P. 9th Cir.
 12 1996)(IRC § 6151 construed as providing that taxes are due and payable on the due
 13 date of the return, not date of assessment; Pan American Van Lines v. United
 14 States, 607 F.2d 1299 (9th Cir. 1979)(Tax due on the date return is originally due,
 15 not on date of any extension); Hartman v. Laucher, 238 F.2d 88, 887 (8th Cir.
 16 1956)("by the terms of the Internal Revenue Code income tax liability matures on
 17 the day the return is required to be filed, and the correct amount of the tax liability
 18 becomes due at that time, regardless when the deficiency assessment may be
 19 made"); Simson v. United States, 56 F.Supp.2d 1193 (D.Or. 1999)(courts have
 20 construed section 6151 to mean that regardless of when taxes are assessed, the
 21 taxes are considered "due and owing – and constitute a liability – as of the date the
 22 tax return for the specified period is required to be filed")(citing Baasch v. United
 23 States, 742 F.Supp. 65, 68 (E.D.N.Y.1990), aff'd 930 F.2d 911 (2nd Cir.
 24 1991)(Table)).

25 5. Pursuant to 26 U.S.C. § 7672, income tax returns, and other returns
 26 that are made on the basis of the calendar year, are required to be filed on or before
 27 the 15th day of April following the close of the calendar year. Accordingly,
 28 Kenneth McGrew's outstanding federal income tax liabilities for 2000 through

1 2005 became due and payable on April 16, 2001 (for 2000), April 15, 2002 (for
2 2001), April 15, 2003 (for 2002), April 15, 2004 (for 2003), April 15, 2005 (for
3 2004) and April 17, 2006 (for 2005). (The 2001 and 2005 returns were due on
4 April 16, 2002 and April 17, 2006, respectively, because April 15 fell on a Sunday
5 in 2001 and a Saturday in 2006.)

6 6. A certified Certificate of Assessments, Payments, and Other Specified
7 Matters (Internal Revenue Service Form 4340) creates a rebuttable presumption
8 that a tax was properly assessed pursuant to 26 U.S.C. § 6201 and that notice and
9 demand for payment was sent to the taxpayer as required by 26 U.S.C. § 6303.
10 Hughes v. United States, 953 F.2d 531, 535 (9th Cir. 1992) (Form 4340 sufficient
11 to establish that assessments were made). Moreover, certified Forms 4340 are self-
12 authenticating and admissible as public records. Id., at 539-40.

13 7. Based on the foregoing, the government has proven the amount and
14 propriety of the Assessments.

15 8. Third parties -- such as defendant Eileen McGrew -- are not entitled to
16 dispute the validity of assessments with respect to other individuals' tax liabilities.
17 See, e.g., Al-Kim, Inc. v. United States, 650 F.2d 944, 947 (9th Cir. 1981) ("neither
18 the Internal Revenue Code nor the decisions of this court support any right of third
19 parties to contest the merits of a tax assessment."); Graham v. United States, 243
20 F.2d 919, 922 (9th Cir. 1957) ("[O]nly the taxpayer may question the assessment for
21 taxes").

22 9. A lien for unpaid tax liabilities arises in favor of the United States
23 against all property and rights to property owned by the taxpayer as of the
24 assessment date. 26 U.S.C. § 6321 and 26 U.S.C. § 6322.

25 Section 6321 provides:

26 If any person liable to pay any tax neglects or refuses to pay the same after
27 demand, the amount (including any interests, additional amount, addition to
28 tax, or assessable penalty, together with any costs that may accrue in

1 addition thereto) shall be a lien in favor of the United States upon all
 2 property and rights to property, whether real or personal, belonging to such
 3 person.

4 Section 6322 provides:

5 Unless another date is specifically fixed by law, the lien imposed by section
 6 6321 shall arise at the time the assessment is made and shall continue until
 7 the liability or the amount so assessed (or a judgment against the taxpayer
 8 arising out of such liability) is satisfied or becomes unenforceable by reason
 9 of lapse of time.

10 10. The statutory language governing tax liens “is broad and reveals on its
 11 face that Congress meant to reach every interest in property that a taxpayer might
 12 have.” United States v. National Bank of Commerce, 472 U.S. 713, 719-720
 13 (1985); see also, Drye v. United States, 528 U.S. 49, 56 (1999)(citing National
 14 Bank of Commerce); Glass City Bank of Jeanette, Pa. v. United States, 326 U.S.
 15 265, 267 (1945)(noting that “[s]tronger language could hardly have been selected
 16 to reveal a purpose to assure the collection of taxes.”).

17 11. Accordingly, at the time that Kenneth McGrew’s 2000-2005 tax
 18 liabilities were assessed -- between 2004 and 2007 -- the United States acquired
 19 liens against all of his property, including his community property interest in the
 20 Subject Property.

21 12. State law governs the nature of the interest a taxpayer has in
 22 “property” or “rights to property” to which a federal tax lien attaches. Morgan v.
 23 Commissioner, 309 U.S. 78, 82 (1940)(“State law controls in determining the
 24 nature of the legal interest which the taxpayer ha[s] in property”); United States v.
 25 Bess, 357 U.S. 51, 55 (1958) (Internal Revenue Code does not create property
 26 rights, but merely attaches federally defined consequences to rights created under
 27 state law); United States v. Craft, 535 U.S. 274, 278 (2002)(the federal lien statute
 28 attaches federal consequences to rights created under state law); See also, United

1 States v. National Bank of Commerce, 472 U.S. 713, 722 (1985); Aguilino v.
 2 United States, 363 U.S. 509, 513 (1960); In re Glad, 66 B.R. 115, 118 (9th Cir.
 3 BAP 1986).

4 13. A nonliable spouse's community property interest in property subject
 5 to federal tax liens does not affect the right of the United States to foreclose on the
 6 real property and apply the proceeds to satisfy its liens. Under section 751 of the
 7 California Family Code, each spouse has equal interests in the whole of the
 8 community property. McIntyre v. United States, 222 F.3d 655, 658 (9th Cir. 2000).
 9 Thus, the Ninth Circuit has held that California law implicitly gives the husband
 10 rights in the wife's share sufficient to meet the requirements for the attachment of
 11 tax liens. Id., (citing Babb v. Schmidt, 496 F.2d 957, 960 (9th Cir. 1974)). When
 12 the federal tax liens arise by operation of law, they attach to the entire property
 13 held as community property with the taxpayer's spouse. Id.

14 14. Accordingly, (1) Kenneth McGrew owned an undivided community
 15 property interest in the Subject Property when the tax liabilities were incurred
 16 (between 2001 and 2006) and when the Assessments were made (between 2004
 17 and 2007), and (2) by virtue of Kenneth McGrew's community property interest,
 18 the Subject Property became subject to federal tax liens to secure the payment of
 19 the tax liabilities at the time of the Assessments. 26 U.S.C. §§ 6321, 6322; United
 20 States v. Overman, 424 F.2d 1142 (9th Cir. 1970); Ackerman v. United States, 424
 21 F.2d 1148 (9th Cir. 1970); Babb v. Schmidt, 496 F. 2d 957 (9th Cir. 1974);
 22 McIntyre v. United States, 222 F.3d 655, 659 (9th Cir. 2000).

23 15. Under California law, the entire community is liable for the debts
 24 incurred by one of the spouses during the marriage, if the debts were incurred prior
 25 to separation. California Family Code Section 910 provides:

26 (a) Except as otherwise expressly provided by statute, the community estate
 27 is liable for a debt incurred by either spouse before or during marriage,
 28 regardless of which spouse has the management and control of the property

1 and regardless of whether one or both spouses are parties to the debt or to a
2 judgment for the debt.

3 (b) ‘During marriage’ for purposes of this section does not include the
4 period during which the spouses are living separate and apart before a
5 judgment of dissolution of marriage or legal separation of the parties.

6 See also, Lezine v. Security Pacific Financial Services, Inc., 14 Cal.4th 56, 64
7 (1996)(under § 910(a), “the liability of community property is not limited to debts
8 incurred for the benefit of the community, but extends to debts incurred by one
9 spouse alone exclusively for his or her own personal benefit”); In re Mantle, 153
10 F.3d 1082, 1085 (9th Cir. 1998)(division of community property, not dissolution of
11 marriage, is the event which terminates the liability of community property for a
12 postmarital debt incurred by one of the spouses); In re McCoy, 111 B.R. 276, 279-
13 80, 282 (9th Cir. B.A.P. 1990)(non-debtor spouse’s interest in community property
14 not liable for debts incurred after separation).
15

16 16. Accordingly, at the time that the Court issued the Property
17 Distribution Order on or about September 28, 2009, (1) all of Kenneth McGrew
18 and Eileen McGrew’s community property -- including the Subject Property -- was
19 liable for Kenneth McGrew’s 2000 tax liability (which was incurred on April 15,
20 2001, when the tax return was due, and before Kenneth McGrew and Eileen
21 McGrew separated), and (2) Kenneth McGrew’s undivided one-half interest in the
22 community property was liable for his tax liabilities for 2001 through 2005 (which
23 were incurred after separation but before the property was divided).

24 17. Eileen McGrew’s claim that the liens never attached to the property
25 because she obtained an interlocutory divorce decree before the Assessments were
26 made is unavailing, because under California law, the interlocutory decree did not
27 alter the fact that Kenneth McGrew and Eileen McGrew owned the Subject
28 Property as community property. See, In re Mantle, 153 F.3d 1082, 1085 (9th Cir.

1 1998)(division of community property, not dissolution of marriage, is the event
2 which terminates the liability of community property for a post-marital debt).
3 Further, Eileen McGrew admitted in her answer to the United States of America's
4 complaint that she and Kenneth McGrew owned the Subject Property as
5 community property between 1996 and 2010, during the time period that the tax
6 liabilities were assessed and the tax liens arose. (See, Complaint, ¶ 28, Answer, ¶
7 28). That admission is binding on Eileen McGrew as a judicial admission, and
8 Eileen McGrew's opposition to the motion for summary judgment fails to cite any
9 specific evidence to the contrary or show that the materials cited by the
10 government (in this case, Eileen McGrew's answer) are insufficient. See,
11 American Title Insurance Company v. Lacelaw Corporation, 861 F.2d 224, 226.
12 (9th Cir. 1988). Moreover, Eileen McGrew is collaterally estopped from claiming
13 that she and Kenneth McGrew held the Subject Property as community property,
14 because in distributing assets and liabilities in the Dissolution Proceedings, the
15 court treated the Subject Property as a community asset. United States v.
16 Mendoza, 464 U.S. 154, 158 (1984) ("under the judicially-developed doctrine of
17 collateral estoppel, once a court has decided an issue of fact or law necessary to its
18 judgment, that decision is conclusive in a subsequent suit based on a different
19 cause of action, involving a party to the prior litigation").

20 18. Under both California and federal law, the tax liens remained attached
21 to the Subject Property and in effect after the court in the dissolution Proceedings
22 awarded the Subject Property to Eileen McGrew pursuant to the Property
23 Distribution Order.

24 19. Under California law, a property division pursuant to a marital
25 dissolution has no effect on pre-existing liens. California Family Code Section
26 916(a) provides:

27 The separate property owned by a married person at the time of the division
28 [of the community property] and the property received by the person in the

1 division is not liable for a debt incurred by the person's spouse before or
 2 during marriage, and the person is not personally liable for the debt, unless
 3 the debt was assigned for payment by the person in the division of the
 4 property. *Nothing in this paragraph affects the liability of property for the*
 5 *satisfaction of a lien on the property.*

6 Cal. Fam. Code § 916(a)(2)(Emphasis added). See also, Kinney v. Vallentyne, 15
 7 Cal. 3d 475 (1975)(real property awarded to ex-wife in marital dissolution
 8 proceedings as her separate property remained subject to judgment lien recorded
 9 by ex-husband's creditors before the marital property division arising from ex-
 10 husband's commission of personal torts against creditor victim and the victim's
 11 husband); Meija v. Reed, 74 P.3d 166, 172 (2003)("The only statutory exception
 12 to the Family Code section 916's grant of immunity from liability is a provision
 13 that preserves the liability of property subject to a preexisting lien."); Lezine v.
 14 Security Pacific Financial Services, Inc., 14 Cal.4th 56 (1996)(residence that had
 15 been awarded to the plaintiff as her sole and separate property in marital
 16 dissolution proceedings remained subject to the defendant bank's judgment lien,
 17 because the lien attached before the plaintiff had been awarded the property, even
 18 though (1) the plaintiff's husband had granted the bank a security interest in the
 19 residence without the plaintiff's knowledge or consent; (2) the plaintiff was not
 20 aware of the bank's lien at the time of the property division, and (3) the dissolution
 21 court had assigned the underlying debt on the loan to the plaintiff's husband);
 22 United States v. Berger, 574 F.3d. 1202 (9th Cir. 2009)(government could satisfy
 23 criminal restitution judgment imposed on defendant through sale of defendant's
 24 and wife's real property, including former wife's one-half community property
 25 interest in the sale proceeds, and former wife's half interest could be used to satisfy
 26 the judgment, even though she was not involved in any wrongdoing associated
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1 with the husband's illegal scheme and even though none of the proceeds of the
 2 scheme had been invested in the property). (A criminal restitution order under the
 3 Mandatory Victim Restitution Act has the same scope as a federal tax lien. "[A]
 4 restitution order under the MVRA is 'a lien in favor of the United States on all
 5 property and rights to property of the person.'" Berger, supra, 574 F.3d at 1204
 6 (citing 18 U.S.C. § 3613(c).

7
 8 20. The effect under the federal law is the same; once a federal lien
 9 attaches to property, it cannot be extinguished by a subsequent transfer. United
 10 States v. Donohoe Industries, Inc., 905 F.2d 1325, 1330-31 (9th Cir. 1990) (holding
 11 that bank was required to honor IRS levy, because at the time the bank acquired
 12 the taxpayer company's accounts receivable, the receivables were subject to
 13 federal tax lien). As the Ninth Circuit stated in Donahoe Industries:

14 A federal tax lien attaches to a taxpayer's property when unpaid taxes are
 15 assessed, and continues to attach until either the tax is paid or the lien
 16 becomes unenforceable because of lapse of time. 26 U.S.C. §§ 6321, 6322.
 17 The lien continues to attach to a taxpayer's property regardless of any
 18 subsequent transfer of the property. *United States v. Bess*, 357 U.S. 51, 57,
 19 78 S.Ct. 1054, 1058, 2 L.Ed.2d 1135 (1958); *United States v. Oil Resources,*
 20 *Inc.*, 817 F.2d 1429, 1433 n. 3 (9th Cir.1987); *Omnibus Fin. Corp. v. United*
 21 *States*, 566 F.2d 1097, 1103 (9th Cir.1977).
 22 905 F.2d at 1330-31. See also, United States v. Bess, 357 U.S. 51, 57 ("The
 23 transfer of property subsequent to the attachment of the lien does not affect the
 24 lien."); 26 C.F.R. § 301, 63331-1(a)(1).

25 21. Accordingly, neither the Property Distribution Order nor the
 26 subsequent grant deed transferring the Subject Property to Eileen McGrew as her
 27 sole and separate property affected the liens.

28 22. Eileen McGrew's defense that she would qualify as an "innocent
 spouse" under 26 U.S.C. § 66 is unavailing, because innocent spouse relief only

1 serves to protect a non-liable spouse from personal tax liability and Eileen
 2 McGrew has admitted that the Internal Revenue Service has never sought to hold
 3 her personally liable for Kenneth McGrew's tax liabilities. Further, nothing in
 4 Section 66 authorizes the Internal Revenue Service to abrogate valid federal tax
 5 liens, and the section does not confer jurisdiction on federal district courts to make
 6 "innocent spouse" determinations.¹

7 23. 26 U.S.C. §§ 7403(a) and (c) provide in pertinent part:

8 (a) Filing
 9

10 In any case where there has been a refusal or neglect to pay any tax, or to
 11 discharge any liability in respect thereof. . . the Attorney General or his
 12 delegate at the request of the Secretary, may direct a civil action to be
 13 filed in a district court of the United States to enforce the lien of the
 14 United States under this title with respect to such tax or liability

15 (c) Adjudication and decree
 16

17 The court shall, after the parties have been duly notified of the action,
 18 proceed to adjudicate all matters involved therein and finally determine
 19 the merits of all claims to and liens upon the property, and in all cases
 20 where a claim or interest of the United States therein is established, may
 21 decree a sale of such property, by the proper officer of the court in
 22 respect to the interests of the parties and of the United States

23 24. Once the United States establishes that a taxpayer has an interest in
 24 property and that the tax lien of the United States has attached to that interest, it is

25 ¹ The Section 66 defense is also unavailing because most of the "facts" upon which
 26 it is based have not been proved by competent evidence. The defense is based in
 27 large part on the Court's findings in the Dissolution Proceedings - - findings which
 28 are not binding on the United States of America because it was not a party to the
 Dissolution Proceedings.

1 well settled that the United States may foreclose its lien against the taxpayer's
2 interest in the subject property. 26 U.S.C. § 7403; United States v. Rodgers, 461
3 U.S. 677 (1983) ("Rodgers").

4 25. Although, under Rodgers, district courts have limited discretion to not
5 order a foreclosure sale under 26 U.S.C. § 7403, defendants have the burden of
6 proof as to whether a court should use its limited discretion to not issue a
7 foreclosure order. See United States v. Padilla, 94 A.F.T.R.2d (RIA) 6811, 2004
8 U.S. Dist. LEXIS 23112, at*4 (E.D. Cal. 2004). Eileen McGrew has not met that
9 burden, because (1) the Court's ability to its exercise its limited grant of discretion
10 not to foreclose under Rodgers is inapplicable in these circumstances, and (2) in
11 any event, the Rodgers factors do not weigh against foreclosure.

12 26. Rodgers limited discretion analysis only applies if a property owner
13 who is not liable for the delinquent tax, also does not have a property interest that
14 is subject to foreclosure. Although the spouse seeking denial of foreclosure in
15 Rodgers had a community property interest, that was not the interest which the
16 Supreme Court held triggered the court's discretion with respect to ordering
17 foreclosure. Rodgers, 461 U.S. 677, 687 (1982). Rather, the Supreme Court was
18 concerned only with the unique provisions of Texas' homestead law which, unlike
19 California community property law, arguably carved out a separate interest from
20 the non-labile spouse. Rodgers, 461 U.S. at 684. In California, homesteads do not
21 create a separate interest that is not reached by federal tax liens. Shaw v. United
22 States, 331 F.3d 493, 497 (9th Cir. 1964). See, also, United States v. Fitch, 108
23 A.F.T.R.2d (RIA) 5428, 2011 U.S. Dist. LEXIS 81052, at*13-17 (Dist. Idaho
24 2011). Rodgers is inapplicable here, because at the time that Kenneth McGrew
25 incurred the 2000 tax liability, all of Kenneth and Eileen McGrew's community
26 property --including Eileen McGrew's undivided one half interest in the Subject
27 Property -- was liable for the tax and thus subject to a federal tax lien under 26
28 U.S.C. §§ 6321 and 6323. As previously discussed, Eileen McGrew acquired her

1 present interest in the Subject Property subject to that lien, as well as the liens
2 arising from the 2001 through 2005 tax liabilities. Accordingly, without an interest
3 that is not subject to the tax liens, Eileen McGrew has no right or claim to block a
4 forced sale, and the Court's limited discretion under Rodgers does not come into
5 play.

6 27. Even if Rodgers limited discretion was applicable, foreclosure still
7 would be warranted, because the Rodgers factors which are required to be
8 considered in such circumstances do not weigh against a forced sale.

9 28. In Rodgers, the Supreme Court listed four factors that a court may
10 consider in determining whether it should exercise its limited discretion to deny
11 foreclosure, if a party has a separate property interest that is not subject to the
12 government's tax liens. Rodgers, 461 U.S. at 710-11.

13 29. The first factor is the economic prejudice to the United States of a
14 partial sale. Id. At 710. This factor weighs in favor of foreclosure, because the
15 Subject Property is a single family residence, and a sale of a partial interest in the
16 property would be impractical and would result in severe prejudice to the United
17 States.

18 30. The second factor is the third party's legal expectations that the
19 property would be protected from a forced sale. Id. at 710-11. This factor also
20 weighs in favor of foreclosure. Although Eileen McGrew has claimed that she
21 expected, based on the Property Distribution Order and her consultation with an
22 unidentified tax preparer in 2006, that the government would not seek to foreclose
23 on the liens, no such expectation could have been reasonable based on the law (and
24 thus "legally recognized") in light of California community property law, the
25 statements of Eileen McGrew's counsel regarding the lien in the 2008 Mandatory
26 Settlement Conference Statement and 2009 Trial Brief, and the fact that the
27 Property Distribution Order specifically noted that there was a tax lien on the
28

property.² (The fact that the Court in the Dissolution Proceedings Court confirmed the tax liabilities as Kenneth McGrew's personal responsibility may be relevant between Eileen McGrew and Kenneth McGrew, but in no way suggests that the Court was attempting to vitiate the federal tax liens - - something the Court, in any event was powerless to do under both federal and California law.)

31. In this regard, the statements by Eileen McGrew's counsel in the mandatory settlement conference statement and trial brief in the Dissolution Proceedings, as discussed above at Findings of Fact 14 and 15, constitute admissions of a party opponent under Fed. R. Ev. 801(d)(2). See, e.g., Totten v. Merkle, 137 F.3d 1172,1176 (9th Cir. 1998).

32. The third Rodgers factor is potential prejudice to a third party by virtue of relocation costs and potential under compensation. Id. at 711. This factor, standing alone, would not be sufficient to block a foreclosure, and in any event, would not support such a result. Although Eileen McGrew has argued that the third factor weighs against foreclosure because a forced sale would require her to relocate, the need to relocate is not the type of prejudice that Rodgers contemplated. Rather, the third Rodgers factor envisions a special circumstance beyond "the inherent inequity of being removed from one's home," because if that were sufficient, "the government could never foreclose on a jointly owned residence -- a result clearing untenable under § 7403." United States v. Bierbrauer, 936 F.2d at 375-76. Moreover, it would be an abuse of discretion to block a forced sale on the third factor alone. United States v. Burtsfield, 556 F.Supp. 2d 1172, 1176 (D. Mont. 2008)(citing United States v. Gibson, 817 F.2d 1406(9th Cir. 1987)(refusal to foreclose based only on wife's testimony on third factor of

² Eileen McGrew could not reasonably have relied on the Property Distribution Order, because the order specifically stated that there was a tax lien on the property. She could not have had a legally recognized expectation based on the advice of the tax preparer, because the tax preparer's alleged advice was blatantly contrary to law.

1 Rodgers analysis, that she had no other residence to go to if the court were to order
2 a forced sale, was abuse of court's limited discretion). As the Court indicated in
3 Burtsfield, "[a] certain degree of prejudice is undoubtedly present in every case
4 where the Court authorizes the forced sale of property in which a non-liaible third
5 party has an ownership interest." United States v. Burtsfield, 556 F.Supp.2d 1172,
6 1176 (D. Mont. 2008)(citing United States v. Bierbrauer, 936 F.2d 373, 375-76 (8th
7 Cir. 1991).

8 33. In this case, there is no evidence that Eileen McGrew would suffer
9 any prejudice beyond the inherent inequity of being removed from her home if the
10 United States were permitted to foreclose on the Subject Property. Eileen
11 McGrew's arguments that she may not be able to purchase a comparable residence
12 in the same neighborhood as the Subject Property and that her son may have to
13 attend a different school in the event of a forced sale are insufficient grounds for
14 the Court to refuse to order foreclosure or to find that foreclosure is not warranted.

15 34. The fourth Rodgers factor is the comparative property interests of the
16 delinquent property of the taxpayer, which requires comparing the size of the
17 interest to which the liens attach to the interest to which the liens do not attach. Id.
18 at 711. The fourth factor also weighs in favor of foreclosure, because, as
19 previously explained, the entirety of the Subject Property is subject to the tax liens.

20 35. Accordingly, the Court declines to exercise its limited
21 discretion under Rodgers not to order a forced sale of the Subject Property.

22 36. Based on the foregoing, the Court concludes that there are no issues of
23 material fact and that the United States has met its burden of proving that it is
24 entitled to summary judgment granting a foreclosure order with respect to the
25 Subject Property.

26 37. Finally, pursuant to 26 U.S.C. § 7403, the Court must determine the
27 merits of all claims to the Subject Property. Based on the FTB Stipulation and the
28

1 undisputed facts regarding the PHH mortgage, the proceeds of the sale of the
2 Subject Property should be disbursed as follows:

- 3 (a) First, in payment of any outstanding real property taxes
4 owing with respect to the Subject Property;
- 5 (b) Second, in payment of the outstanding balance on the PHH
6 Loan;
- 7 (c) After the PHH Loan is paid in full, the remainder of the
8 proceeds shall be split in half – with one half attributed to
9 Kenneth McGrew’s former community property interest,
10 and the other half attributed to Eileen McGrew’s former
11 community property interest. The proceeds will then be
12 disbursed as follows.
- 13 (i) from Kenneth McGrew’s half, in satisfaction of Kenneth
14 McGrew’s outstanding California State income tax
15 liabilities for 2001; and then
- 16 (ii) equally from Eileen McGrew’s half and Kenneth
17 McGrew’s half, in satisfaction of Kenneth McGrew’s
18 outstanding federal income tax liabilities for 2000.
- 19 (iii) After the federal income tax liability for 2000 is
20 satisfied,
21 any remaining proceeds from Eileen McGrew’s half
22 should be disbursed to Eileen McGrew. The remaining
23 proceeds from Kenneth McGrew’s half should be
24 disbursed as follows:
- 25 (aa) first, to pay the outstanding 2001 federal tax liability;
26 (bb) second, to pay the outstanding 2003 California tax
27 liability;
28

- (cc) third, to pay the outstanding 2004 California tax liability;
(dd) fourth, to pay the outstanding 2002 federal tax liability;
(ee) fifth, to pay the outstanding 2003 federal tax liability;
(ff) sixth, to pay the outstanding 2004 federal tax liability;
(gg) seventh, to pay the outstanding 2005 federal tax liability;
(hh) eighth, to pay the outstanding 2002 California tax liability;
(ii) ninth, to pay the outstanding 2005 California tax liability;
and
(jj) tenth, to pay the outstanding 2006 California tax liability.

Any surplus remaining after the foregoing disbursements shall be deposited with the Clerk of the Court.

38. Based on the foregoing, the United States of America's motion for summary judgment is granted, defendant Eileen McGrew's cross-motion for summary judgment is denied, and the February 15, 2015 trial date is vacated.

39. Any uncontroverted conclusion of law or mixed conclusion of fact and law deemed more appropriately designated as a conclusion of fact is incorporated herein as a statement of fact.

Dated: December 19, 2014



HON. MANUEL L. REAL
United States District Judge

Submitted By:

PAUL H. ROCHMES
Assistant United States Attorney